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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No 930

ALBERT P. DICKER, ET. AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a condemnation judgment in the amount of $1,303,594.00 and the denial of a motion for a new trial on the ground of newly discovered evidence.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A, pp. 1 to 9 *infra,*) is reported at 352 F.2d 455. There is no opinion of the District Court.

JURISDICTION

The judgment of the Court of Appeals (App. B, pp. 10 to 11, *infra*) was entered on October 22, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pre-trial order of the District Court, solicited by the Government in a condemnation case, prohibiting the property owners from seeking any discovery of the real estate experts employed by the Government and their appraisal reports (a) was a denial of a right to discovery provided for in the Federal Rules of Civil Procedure and (b) violated the principles defined by this Court in *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

2. Whether the owners were prejudiced by the pre-trial order (a) when it prohibited them from ascertaining the valuations of the Government's experts, as well as their factual basis and (b) when it prevented the owners from knowing that the Government's first choice real estate experts had made four separate independent written appraisals contradicting the valuations of

its second choice experts submitted by the Government to the jury.

3. Should the Government be held to a higher standard of fairness in an eminent domain case, where a Fifth Amendment right to just compensation is guaranteed, than in ordinary civil litigation.

4. When the Government takes private property for public use, does the Government have any duty or obligation under the Fifth Amendment to make available to the owners written reports of experts in its files contradicting the testimony submitted by the Government to the jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> . . . nor shall private property be taken for public use, without just compensation . . .

The District of Columbia Code (1961 ed.), Sec. 16-628, providing for a "quick take" by the Government of private property and permitting the Government unilaterally to acquire immediate title and possession to private property upon payment into Court of a Government "estimate of just compensation," states in part:

> Upon the filing of said declaration of taking and of the deposit in the registry of the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be con-

demned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the registry.

STATEMENT

This was a condemnation proceeding by the United States in the United States District Court for the District of Columbia involving the property known as the Merchants Storage and Transfer property located at 918-922 E Street, N.W., in downtown Washington. It was taken for public use for the construction of a new Federal Bureau of Investigation building. The United States became immediately vested with the fee simple title to the property upon its "quick take" declaration of taking and the deposit in the registry of the District Court of its estimate of just compensation. (District of Columbia Code (1961 ed.) Sec. 16-628.) The sole issue in the ensuing condemnation proceeding was the determination of just compensation payable to the owners under the Fifth Amendment.

In their pre-trial statement and at a meeting with counsel for the Government, counsel for the owners stated that they would seek discovery of the appraisals of the Government's experts. Counsel for the Government refused a proposal of the owners that all appraisal reports of the real estate experts of the parties be exchanged and

took the position that the reports of Government experts constituted the privileged "work product" of counsel and were not subject to discovery. This issue was submitted to the District Court at a pre-trial hearing. The District Court accepted the argument of the Government against disclosure and entered the following pre-trial order:

> "10. Counsel for the Government and counsel for the owners will exchange names of the appraisers which each expects to call as witnesses. Apprisal reports will not be exchanged and no additional discovery pertaining to these expert witnesses will be allowed." (App. p. 11.)

At the trial the issue of just compensation was submitted to the jury upon the testimony of real estate experts employed by the owners and by the Government. One expert for the owners valued the property at $2,577,000 (App. 193, 194) and the second expert for the owners valued the property in excess of this amount (App. 439). The Government's real estate experts deemed the property to have a fair market value of $1,140,000 (App. 54) and $1,311,750 respectively (App. 133). The award of the jury was in the amount of $1,303,594.

Although the pre-trial order precluded any discovery of the appraisal reports of government experts before and during the trial, Petitioners thereafter ascertained important information with respect to them and promptly filed in the District Court a Motion for a New Trial on the ground of newly discovered evidence supported by affidavits (App. 604). This Motion showed:

Shortly after taking the property the Government employed experienced, outstanding real estate experts, William F. Harps and Arthur M. Fisher, to make careful valuations of the property and to testify for the Government as to their values in the condemnation proceeding

(App. 605). Pursuant to this employment Harps and Fisher made studies of the property and submitted to the Government their respective appraisals, which took into consideration all relevant and material factors, as they were required to do, including an executed lease of the buildings to the General Services Administration at an annual rental of $389,000.00 after required remodeling (App. 606). Their separate valuations of the property were about $2,275,000 and $2,380,000 (App. 611, 613).

The Motion further stated that, upon receipt of these appraisals a government official directed Harps and Fisher to make new appraisals of the property upon a basis which disregarded the government lease and the rental provided in it (App. 606). Each expert complied with this directive and submitted new appraisals which again showed that the property had a fair market value at the time of taking far in excess of the values submitted by the Government in the condemnation proceeding (App. 606). The Government then disregarded the four separate appraisals of Harps and Fisher and employed "second-string" real estate experts who appraised the property at comparatively low values and the Government submitted their testimony to the court and jury (App. 606). Counsel for the owners did not know before and during the trial the facts stated above and, if counsel for the owners had known that Harps and Fisher had valued the property at amounts far in excess of the values submitted by the Government at the trial, they would have called them to testify at the trial (App. 606, 607).

The Opposition of the Government to the Motion did not deny the facts stated in the Motion (App. 615, 618) but asserted that appraisals of real estate experts constituted the "work product" of counsel and were not

subject to discovery; that the District Court in its pre-trial order in recognition of this principle had refused to permit discovery of the appraisal reports; that the Court did require an exchange of the names of appraisers to be called at the trial; and that this order was complied with by the Government and the owners knew prior to trial that Harps and Fisher had made appraisals of the property for the Government (App. 616, 618).[1]

Petitioners subpoenaed Harps and Fisher and their reports for the hearing on their Motion and Harps and Fisher with their appraisal reports were present in court prepared to testify involuntarily pursuant to the subpoenas and to produce their appraisals made for the Government (App. 623). The District Court refused to permit their testimony to be taken or their appraisal reports to be submitted in evidence (App. 623) and denied the Motion for a New Trial (App. 624).

Upon appeal the Court of Appeals in an opinion by Judge Warren E. Burger affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case presents substantial issues of public importance as to the scope of discovery of real estate experts and their appraisal reports in an eminent domain proceeding.

The pre-trial order, prohibiting an exchange of appraisal reports and any discovery pertaining to the experts barred any form of discovery under the Federal

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[1] It is conceded that counsel for the owners knew that Harps and Fisher had appraised the property for the Government.

Civil Rules,[2] i.e., interrogatories under Rule 23, depositions under Rules 26-32 and a motion to produce under Rule 34. Although a party is entitled to take depositions and serve interrogatories without the prior sanction of the court or even its knowledge of what the party is doing (*Schlagenhauf* v. *Holder,* 379 U.S. 104, 117 (1964)) and only Rule 34 requires "good cause", it would have been a contempt of Court for counsel for the property owners in this case to have sought discovery of the Government's experts and their appraisals by interrogatories, depositions or motion. The order not only prevented counsel from seeking discovery relief in any form but it not unreasonably may be interpreted as even precluding counsel for the owners from communicating with the real estate experts of the Government.[3]

Whether a District Court can prohibit by pre-trial order any discovery with respect to real estate experts and their valuation reports and whether such reports are obtainable under the Federal Rules of Civil Procedure on behalf of the owner of private property taken for public use are questions which may arise in any condemnation case in the country. Not only Petitioners, but other owners, large and small, whose property may be taken for

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[2] Rule 71A effective August 1, 1951, provided that the Federal Civil Rules should govern condemnation proceedings except as to certain irrelevant matters.

[3] The United States Court of Military Appeals has held that it was a violation of due process for a commanding officer to direct a serviceman, charged with an offense, not to communicate with certain witnesses on the ground that a denial of access to any witness made his right to compulsory process for the production of witnesses and other evidence meaningless. *United States* v. *Aycock,* 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964).

public use, as well as the condemning authority, i.e., the Government and public utilities, are affected by the questions presented.[4]

The Federal District Court decisions as to the discovery of appraisal reports of real estate experts in a condemnation case are in conflict.[5] Many of them do not

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[4] In the fiscal year 1964 the Government paid out as just compensation in condemnation cases $86,778,637.00. "This represents an average deposit of $339,676.75 and the disbursement to land owners of an average of $341,644.28 for each working day of the year." At the end of the fiscal year 1964 there were pending in condemnation 15,747 tracts of land. "Each year the United States pays more in judgments and settlements in condemnation cases than in all its other litigations combined." *Annual Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1964*, p. 289,306.

[5] The following cases permit discovery: *United States* v. *23.76 Acres of Land*, 32 F.R.D. 593 (D.C. Md. 1963); *United States* v. *62.50 Acres of Land, Etc.*, 23 F.R.D. 287 (D.C.N.D. Ohio 1959); *United States* v. *1,278.83 Acres, Etc.*, 12 F.R.D. 320 (D.C.E.D. Va. 1952); *United States* v. *Certain Parcels of Land, Etc.*, 15 F.R.D. 224 (D.C.S.D. Cal. 1954); *United States* v. *50.34 Acres of Land, Etc.*, 13 F.R.D. 19 (D.C.E.D. NY. 1952); *United States* v. *Certain Parcels of Land, Etc.*, 15 F.R.D. 224 (S.D. Calif. 1954) (subject to *in camera* inspection); *United States* v. *3,595.98 Acres of Land, Etc.*, 212 F. Supp. 617 (N.D. Calif. 1962); *United States* v. *50.34 Acres of Land, Etc.*, 12 F.R.D. 440 (E.D.N.Y. 1952) (deposition restricted to matters pertaining to fair market value).

Contra: *United States* v. *6.83 Acres of Land, Etc.*, 18 F.R.D. 195 (D.C. New Mex. 1955); *United States* v. *7,543.04 Acres of Land, Etc.* 18 F.R.D. 146 (D.C.N.D. Ga. 1954); *United States* v. *Certain Acres of Land, Etc.*, 18 F.R.D. 98 (D.C.M.D. Ga. 1955); *Hickey* v. *United States*, 18 F.R.D. 88 (D.C.E.D. Pa. 1952); *United States* v. *Certain Parcels of Land, Etc.*, 25 F.R.D. 192 (D.C.N.D. Cal. 1959). Cf., *United States* v. *19.879 Acres of Land, Etc.* 27 F.R.D. 420 (D.C.E.D. Supp. 75 (D.C.E.D. NY. 1962) (allowing discovery as to facts only but ruling that term "facts" should be given a liberal interpretation); *United States* v. *19,879 Acres of Land, Etc.* 27 F.RD. 420 (D.C.E.D. N.Y. 1961) (allowing only an exchange of comparable sales); *United States* v. *900.57 Acres of Land, Etc.* 30 F.R.D. 512 (W.D. Ark. 1962); *United States* v. *4.724 Acres of Land, Etc.* 31 F.R.D. 290 (E.D. La. 1962) (special circumstances not shown). *United States* v. *48.49 Acres of Land, Etc.* 32 F.R.D. 462 (S.D. Cal. 1963) (after *in camera* inspection).

permit discovery under the mistaken notion that such reports constitute the privileged "work product" of the lawyer under *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The pre-trial order in this case was made upon this same mistaken assumption (App. 616). Since the District Court decisions make clear that the law is in a chaotic state, it is highly desirable that this important question of discovery in condemnation practice be authoritatively determined in order that there may be a uniform practice in the federal system.[6]

Although 28 years have elapsed since the adoption of the Federal Rules of Civil Procedure and 18 years since *Hickman*, the Circuit Courts of Appeal have not determined this issue in an eminent domain case although the Sixth Circuit has held in a patent infringement case that the services of an expert did not fall within the "work product" of counsel privilege and hence were discoverable.[6a] Since discovery orders are not ordinarily appealable until after final judgment and, however arbitrary the denial of discovery may be, an appellant has difficulty showing prejudice, as best indicated in the opinion of the Court of Appeals in this case, a direct conflict of the Circuits as to the discovery of expert appraisal reports in an eminent domain case is not likely.

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[6] When an issue concerns the construction and application of the Federal Rules of Civil Procedure, this Court has deemed it appropriate for it to determine the issues presented and to formulate for the federal system the necessary guidelines although there is no conflict of circuits. *Schlagenhauf* v. *Holder*, 379, U.S. 104, 117 (1964); *Van Dusen* v. *Barrack*, 376 U.S. 612, 615 (1964); *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940) and *Los Angeles Brush Co.* v. *James*, 272 U.S. 701, 706 (1927). Although there was no conflict of the circuits in *Hickman*, the Court stated that "the importance of the problem, which has engendered a great divergence of views among district courts, led us to grant certiorari." (p. 500).

[6a] *Sachs* v. *Aluminum Co. of America*, 167 F.2d 570 (1948).

There appears to be a clear conflict among the Circuits in ordinary civil litigation as to the interpretation of the decision of this Court in *Hickman* which has influenced the contradictory decisions of the District Courts in condemnation cases. The question posed in *Hickman* was whether the plaintiff had a right under any of the discovery rules to compel defense counsel to produce copies of statements which he had taken from prospective witnesses in the course of his preparation of his client's defense. This Court held that the plaintiff was not entitled as of right to discovery of them. The Court further held that "where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." p. 511. The Circuits are in conflict as to whether the "work product" privilege of *Hickman* extends only to the work of lawyers. The Third Circuit has applied *Hickman* to mean that statements of witnesses obtained by FBI agents for the use of government trial counsel are counsel's privileged work product upon the theory that the privilege should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use." *Alltmont* v. *United States,* 177 F.2d 971 (1949), cert. denied 339 U. S. 967. The Fifth Circuit has held that statements of witnesses taken by claim agents do not constitute the "work product" of counsel and so are not privileged. *Southern Railway* v. *Campbell,* 309 F.2d 569 (1962).

While this conflict of the Circuits is not directed to appraisal reports of real estate experts in condemnation cases, the decisions provide the underlying theories upon which courts have denied or permitted discovery with respect to them. Accordingly it is of public importance

that the conflict of the Circuits be resolved and this case is an appropriate vehicle for that purpose.

The pre-trial order of the District Court in this case and numerous other District Court decisions denying discovery of the appraisal reports of real estate experts or severely limiting any discovery as to them indicate the extent to which the federal discovery rules have been so restrictively interpreted in condemnation cases as to violate the considered mandatory declaration of this Court in *Hickman,* p. 507, and *Schlagenhauf,* that the discovery rules shall be given "a broad and liberal treatment to effectuate their purpose that civil trials in the federal courts no longer need be carried on in the dark." Thus the construction of the Federal discovery rules in condemnation cases lags far behind the more liberal treatment accorded states rules in a number of states. Arizona, California, Iowa, Maryland and Wisconsin permit full discovery of real estate experts in condemnation cases.[7]

The pre-trial order of the District Court drew a shroud of darkness over the discovery process, required citizens to play Russian Roulette in determining whether to call uncalled government witnesses, violated the very purposes of the discovery rules as taught by this Court in *Hickman* and *Schlagenhauf* and was comparable to the most technical legal procedures of the 18th Century.

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[7] *State ex rel. Willey* v. *Whitman,* 91 Ariz. 120, 370 P.2d 273 (1962); *Oceanside Union Sch. Dist.* v. *Superior Court,* 58 Cal. 2d 180, 373 P.2d 439 (1962); *San Diego Professional Assn.* v. *Superior Court,* 58 Cal. 2d 194, 373 P.2d 448 (1962); *Christ* v. *Iowa State Highway Commission,* 123 N.W. 2d 424 (1963); noted 50 Iowa L. Rev. 218 (1964); *Reynolds* v. *Circuit Court for Wankesha County,* 15 Wis. 2d 311, 112 N.W. 2d 686, 113 N.W. 2d 573 (1961); and *United States* v. *23.76 Acres of Land,* above, in which Judge Winter stated that Maryland state courts permit full discovery of expert witnesses in condemnation cases (p. 597).

This determination is of public importance to all citizens whose property may be taken for public use.

2. Because the owners knew before trial that real estate experts Harps and Fisher had been employed by the Government and the Government's case closed without Harps and Fisher being called, the Court of Appeals concluded that Petitioners had "ample opportunity" "to call them as witnesses if they chose" (App. A, p.5). This means that by Court order counsel for property owners may be kept in the dark as to valuation determinations, and the basis for them, of uncalled government experts and then counsel for the owners must subpoena them and put them on the stand as witnesses for the owners without any knowledge whether their testimony will be prejudicial or helpful. Such a scholastic notion is at variance with the basic purpose of the federal discovery rules and particularly so in an eminent domain case where just compensation is required by the Fifth Amendment. The decision of the Court of Appeals would require counsel for property owners to be put to an impossible *Hobson's* choice—the very choice which the discovery rules were designed to prevent, namely, calling uncalled government experts to the stand without knowledge whether their testimony will be prejudicial or helpful to the property owners or waiving their right to complain of an arbitrary improvident pre-trial order. This determination of the Court of Appeals disregarded the fact that not only federal civil procedure assures, and the requirement of a fair trial presupposes adequate discovery opportunity but the constitutional requirement of just compensation to citizens suffering seizure of their property by condemnation precludes citizens being required to play blind man's buff in determining whether to call government witnesses.

This is particularly so in the District of Columbia where so large a portion of the appraising skill is on call to the Government and beholden to the Government for retainer. In such circumstances it is the worst of trial techniques for the citizen to call an appraiser serving the Government without knowing his answer or probable answer—and that answer can be known only through the discovery process. To require the citizen to assume the risk of the witness's answer without the opportunity of pre-trial exploration is to pervert the common sense of informed trial procedure as well as the constitutional requirement of fair compensation. Fair compensation, as in the case of fair trial, presupposes that the process by which the ultimate result is reached is itself fair. This determination of the Court of Appeals establishing the law of the District of Columbia is of public significance to all whose property may be taken for public use.

The Court of Appeals further held that "even if the original denial of discovery had been error, a question we do not reach, the Appellants have not been prejudiced." (App. A, p. 5). That Court then expressed the erroneous view that the testimony of the Government's first choice experts, Harps and Fisher, would have been "cumulative only" and that if the owners had known the amount of their valuations and called them to testify at the trial, the owners would not have been permitted to show that they had been employed by the government. "If Appellants wanted more expert testimony on value it was for them to produce such evidence." (App. A, p. 5).

The notion of the Court of Appeals that the four separate independent appraisal reports of the Government's first choice experts, which were almost twice the values submitted by the Government to the jury, would

have been "cumulative only" seems incredible. When these appraisal reports were totally at variance with those submitted to the jury by the Government, how can it be blandly assumed by an appellate court that, if the jury had known of them, the jury in making its award would have disregarded them? How too could the Court of Appeals have concluded that, if the owners had known of the amounts of the Harps and Fisher appraisals and called them to testify, a jury could not be permitted to know that these experts had been employed by the Government? We know of no rule of evidence that such an undisputed fact is privileged or otherwise inadmissible. One of the most wholesome developments in federal civil practice has been the recent insistence by this Court that federal judges must not pre-empt the function of juries by directed verdicts in the trial of F.E.L. Act and Jones Act cases.[8] The ruling of the Court of Appeals violated the principle underlying the decision of these cases because an exclusion from the jury of the undisputed fact that experts called by the owners had been employed by the Government may be as much an invasion of the function of the jury as a directed verdict. When expert testimony is widely believed to favor the interests of the expert's employer, the fact that experts were employed by the Government, which was interested in establishing the lowest possible valuation, would tend to support their credibility. In a condemnation case a jury may not be denied matters which men consider in their every day affairs.[9]

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[8] *Lavender* v. *Kurn*, 327 U.S. 645 (1946); *Wilkenson* v. *McCarthy*, 336 U.S. 53 (1949); *Schulz* v. *Pennsylvania R.R. Co.*, 350 U. S. 523 (1956); *Rogers* v. *Missouri P.R. Co.*, 352 U.S. 524 (1957); *Webb* v. *Illinois Central R.R. Co.*, 352 U.S. 512 (1957); *Dennis* v. *Denver & Rio Grande R. Co.*, 375 U.S. 208 (1963).

[9] *United States* v. *25.406 Acres of Land*, 172 F.2d 990, 995 (4th Cir. 1949).

If the reactionary ruling of the Court of Appeals were generally accepted, the opinions of medical experts of plaintiffs and defendants as to the extent of the injuries of a plaintiff in a civil tort action or the cause of those injuries, when adverse to the employing party, would not be discoverable and it could not be shown at the trial that they had been employed by the other party. We believe that in the trial of negligence cases all reports of medical experts may be discovered and a party at the trial may show that an expert, whose opinion was adverse to his employer, had been employed by him. When it can be shown that any party has been shopping for experts, the jury should be entitled to know it. In such a case his employer is protected by his right of cross-examination of the expert, i.e., to show that his opinion is based upon erroneous assumptions or methods.

3. Whether the Government should be held to a higher standard of fairness as to disclosure in an eminent domain case, where a Fifth Amendment right to just compensation is guaranteed, than in ordinary civil litigation is a question of public importance. The opinion of the Court of Appeals in this case, determining the law of the District of Columbia, assumes that a condemnation case should be treated as ordinary civil litigation. Every reason advanced by that Court in the opinion of Judge Burger as to why the appraisals of Harps and Fisher, which contradicted those submitted by the Government to the jury, were immaterial and why the property owners were not prejudiced by the pre-trial order prohibiting their discovery presupposed that a condemnation case should be treated as ordinary civil litigation. The failure of the Court of Appeals to discuss the contention of the owners below that in an eminent domain case the Govern-

ment should be held to a higher standard of fairness than in ordinary civil litigation presupposed that the Court deemed the contention without merit. We know of no decision in the federal system determining whether the Government is subject to a higher standard of fairness in an eminent domain case than in ordinary civil litigation and court decisions in this area appear to assume that there is no distinction.

In ordinary adversary civil litigation the Government as a private litigant does not appear to be under any obligation of fairness and need not voluntarily make any information in its files available to the other party to the suit. In a criminal case, where constitutional rights are involved, due process requires the Government to conform to a high standard of disclosure. *Brady* v. *Maryland,* 373 U.S. 83 (1963); *Griffin* v. *United States,* 183 F.2d 990 (D.C. Cir. 1950).

We submit that a condemnation proceeding should not be deemed an ordinary adversary civil action; it is *sui generis.* The Government may institute suit without notice, obtain the fee simple title the same day and so oust the property owner from his title and possession before the owner is even aware that the Government requires his property. The sole issue is usually just compensation under the Fifth Amendment and that is ordinarily determined upon the testimony of real estate experts. By reason of the constitutional right involved, the pre-emption of private property for public use should impose upon the Government a serious and definitive obligation to deal fairly with its citizens. When the United States exercises its extraordinary sovereign power to take private property for public use, the Fifth Amendment imposes upon it an implied contract to pay the owners the

fair value of their property.[10] Under these circumstances an eminent domain proceeding should not be deemed the equivalent of an ordinary adversary civil action, in which counsel are under no duty to make anything available to the other party, however beneficial to it.

The duty of fairness imposed upon the sovereign in an eminent domain case should be more akin to that required in a criminal case than in ordinary civil litigation. A criminal case involves the Fifth Amendment requirement of due process; a condemnation case involves the constitutional right to just compensation secured by the same Amendment. When a person is deprived of his valued personal right to private property, it would seem that the scope of due process should be deemed almost as large as in a case where he is deprived of his liberty.

4. Assuming the Government should be held to a high standard of fairness in an eminent domain case, whether the Government has any duty or obligation to make available to property owners written reports of its experts in its files contradicting testimony as to value of the taken property to be submitted by the Government to the jury is a question of public importance. In *Barbee* v. *Warden,* 331 F.2d 842 (1964), where the Fourth Circuit held that the failure of the Government to disclose voluntarily in a criminal case an opinion of an expert which was favorable to the defense was a violation of due process, the Court treated the opinion of the expert as a material fact. There defense counsel knew of the employment of the expert but assumed that his opinion was unfavorable to the defendant. Yet the Court deemed

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[10] *United States* v. *Great Falls Mfg. Co.,* 112 U.S. 645 (1884); *Hollister* v. *Benedict,* 113 U.S. 59 (185); *United States* v. *Lynah,* 188 U.S. 445 (1903).

this fact immaterial by reason of the affirmative obligation of the government to make the disclosure. In an eminent domain case where value in a metropolitan area may only be determined upon the basis of the testimony of real estate experts, the opinion of an expert should be deemed a material fact when it constitutes the sole means for the fulfillment of the property owner's Fifth Amendment right of just compensation.[11] Similarly a report of an expert geologist employed by the United States expressing the opinion that there is a valuable ore or oil deposit under a farm should not under the Fifth Amendment be withheld by the Government from the property owner in a condemnation proceeding.

The Government, of course, has the absolute discretion to determine which of its experts will be used in a condemnation hearing of just compensation and it is not obligated to call to the witness stand any particular one. The United States can shop for real estate experts until it happens upon one who will put a low value on property taken for public use; but it may not go expert shopping without the owners and the triers of the facts knowing that it has done so. The Government can seek its experts wherever it can find them; it can cull them or reject them; but it cannot deny to the jury its right of access of the facts. Nor can it elicit from a judge a court order prohibiting a property owner from finding out the facts. It cannot hide its doings behind the wall of an order prohibiting discovery.

When the appraisals of the Government's first choice experts tended to confirm the valuation of the real estate

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[11] As long ago as 1890 this Court said: "at best evidence of value is largely a matter of opinion, especially as to real estate." *Montana Railway Co.* v. *Warren,* 137 U.S. 348, 353 (1890).

experts of the owners, it is submitted that the Government was under a duty—if there is to be deemed even an elementary obligation of fairness imposed upon the Government in a Fifth Amendment taking case—to make the Harps and Fisher valuations available to counsel for the owners and to refrain from soliciting from the District Court a pre-trial order prohibiting their discovery. This question would appear to be one of substantial public importance to all owners of property, large and small, who may have their property pre-empted by the Government.

THE RULINGS BELOW WERE ERRONEOUS

1. The pre-trial order prohibiting any discovery of the government experts and their appraisal reports violated the basic principle established by this Court that the discovery rules should be given a broad and liberal treatment to the end that the parties may obtain before trial as much information about the case as possible subject only to limitations of relevancy and privilege. *Hickman,* p. 507; *4 Moore's Federal Practice* (2nd Edition, 1963), Sec. 26.25(3) p. 1545. It has been said that the discovery rules authorize "the broadest sweep of access." *2A Federal Practice and Procedure,* Barron and Holtzoff, Sec. 793 p. 401 (1961 ed.). In *Hickman,* p. 507, the Supreme Court said:

> "We agree, of course, that the deposition—discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The

deposition-discovery procedure simply advances the state at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

In *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) this Court said:

> "Modern instruments of discovery serve a useful purpose, as we noted in *Hickman* v. *Taylor*, 329 U.S. 495. They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. Id. 329 U.S. at 501. Only strong public policies weigh against disclosure."

It is evident that in a Fifth Amendment taking case there are no "strong public policies" weighing against discovery of real estate experts and on the contrary a strong public policy favors it.

An appraisal report of a real estate expert employed by a party to testify in a condemnation case is not the "work product" of counsel as the Government has successfully contended below and in numerous other condemnation cases (see Note 5). Such a report does not constitute notes or memoranda of counsel reflecting his mental impressions of witnesses or private memoranda and personal recollections prepared by counsel in the course of his legal duties as were involved in *Hickman*.[12]

The claim of the Government below that refusal to allow discovery is required by the "work product" of counsel rule (App. 616; Gov't. Brief in Court of Appeals p. 22) would require the conclusion that a valuation of a

[12] There (pp. 509-510), the Supreme Court deemed such memoranda of counsel his "work product" and so *not* subject to discovery, pointing out that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."

real estate expert, which is represented to the triers of the fact as his own unbiased independent work product, is in fact nothing more than the private papers of partisan counsel. There is nothing in *Hickman* to sustain such an artificial scholastic inference and legal scholars have widely rejected it. 2A Barron and Holtzoff, Sec. 798, p. 44; 4 Moore, paragraph 26.24; Friedenthal, *Discovery and Use of an Adverse Party's Expert Information* (1962) 14 Stanford L. Rev. 455, 488; Louisell, *Modern California Discovery* (1963), p. 315, 316; Cf. *Sachs* v. *Aluminum Company of America,* 167 F.2d 570 (6th Cir. 1948).

The District Court opinions authorizing discovery of real estate experts are clearly sound and well reasoned. As District Judge Winter concluded in *United States* v. *23.76 acres of land,* above:

> "Where value is the basic, if not sole, issue in litigation, it is not unfair for either party to know in advance of trial what the other party intends to prove, what opinions his opponent's experts hold, the methods by which those opinions were formulated, and the facts upon which they are based. These are all matters to be presented to the trier of the facts at trial. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."

In the case of *United States* v. *Certain Parcels of Land,* 15 F.R.D. 224 (S.D. Cal. 1954) the Court discussed the concept of "good cause" in Rule 34 as it relates to appraisals in a condemnation proceeding. The Court stated that one might reasonably expect to find in appraisal reports information not disclosed by public records relevant to transactions involving property comparable to that sought to be condemned. The information would appear reasonably calculated to lead to the

discovery of evidence which would be admissible at the trial, might lead to the discovery of evidence of transactions involving comparable property which defendants' experts could cite on direct examination in giving reasons for their opinions as to value, might afford a basis for, or tend to, corroborate the opinion testimony of experts called by defendants as to the value of the property in question, and the factual portions of the appraisal reports might afford a basis for cross-examination of Plaintiffs' appraisers if and when called. In holding that appraisal reports of real estate appraisers were discoverable the Court concluded (p. 237):

> "It sems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case."

The Government suggested below various alleged practical reasons why it is undesirable or unwise for the valuation reports of experts to be discoverable in condemnation cases (Gov't Brief in Court of Appeals pps. 19-23). These are the same hackneyed reasons advanced by the opponents of the federal discovery rules. They were rejected by this Court in *Hickman.*

It is submitted that the pre-trial order of the District Court barring any form of discovery of the Government's real estate experts and their appraisal reports denied Petitioners the benefits of the Federal Civil Rules and was a clear violation of the considered views of this Court in *Hickman, Schlagenhauf* and *Proctor & Gamble.* The order was improvident and effected substantial rights.

2. The decision of the Court of Appeals that Petitioners were not prejudiced by the pre-trial order of the District Court prohibiting any discovery of the Government's real estate experts was erroneous for the reasons herein at pages 12 to 16.

3. The assumption of the Court of Appeals that the Government was under no higher standard of fairness in a Fifth Amendment taking case than in ordinary civil litigation was erroneous for the reasons herein at pages 16 to 18.

4. The assumption of the Court of Appeals that the Government had no duty or obligation under the Fifth Amendment to make available to the owners the real estate reports of experts in its files contradicting the testimony submitted by the Government to the jury was erroneous for the reasons herein at pages 18 to 19.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.[13]

GEORGE COCHRAN DOUB
SHELDON E. BERNSTEIN
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January, 1966

[13] We wish to reserve the right to argue that the repeated rulings of the District Court that a valid subsisting Government lease of the buildings at an annual rental of $389,000.00 could not be considered by the jury as evidence of fair market value denied the owners their Fifth Amendment right to have the jury determine fair value upon consideration of all the facts which a potential buyer would consider and that the Court of Appeals was wrong in its decision that, although these rulings "standing alone constitute error," they were corrected in the charge to the jury. (App. A p. 6-8).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18918

ALBERT P. DICKER, ET. AL.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 19036

CERTAIN LAND IN SQUARE 378
IN THE DISTRICT OF COLUMBIA, ET. AL.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Argued May 4, 1965, Decided October 22, 1965)

Before Bazelon, *Chief Judge,* and Danaher and Burger, *Circuit Judges.*

Burger, *Circuit Judge*: These appeals arise out of condemnation proceedings in which the property owners were awarded $1,303,594 for real estate in Washington,

D.C. The appeals are from the final judgment fixing compensation and from denial of a motion for a new trial on the ground of newly discovered evidence.

The United States filed its complaint and declaration of taking on January 18, 1963. It deposited $1,155,000 in the registry of the District Court as its estimate of just compensation for the property. Three earlier dates are relevant. The property had been acquired by the Appelants March 12, 1962, for one million dollars. At that time the property consisted of warehouses and unimproved lots. Subsequently, on August 8, 1962, after having solicited and received bids for the leasing of office space, the General Services Administration negotiated with the owners a five-year lease beginning May 16, 1963, subject to a comprehensive remodelling of the buildings, at an annual rental of almost $390,000, with an option in the Government to renew for five more years at $417,000 per year. The lease required the owners to give a surety bond to the Government in the amount of one year's rent guaranteeing that the remodelled buildings would be ready for occupancy in accordance with the terms of the lease; it also provided for one thousand dollars a day liquidated damages for delay in performance. Before executing the lease the GSA had an appraisal made of the property and determined that the proposed lease would not be in violation of the Economy Act, which limits Government rentals to an annual rent of fifteen per cent of the value of the property. Thereafter, the owners obtained municipal approval for the remodelling and began some work. On November 8, 1962, the Woodmen of the World Life Insurance Society entered into a written contract with the owners to purchase that portion of the property covered by the Government lease and to lease it

back to the fee owners. This purchase and leaseback was in turn conditioned upon performance of the Government lease and actual occupancy thereunder. The purchase price on the sale and leaseback to the Insurance Society was to be $2,800,000 or the appraised value of the property after remodeling, whichever was the lesser; rent for the leaseback was set at 7.74 per cent of the purchase price, sufficient to give the Insurance Society a six per cent net return and complete amortization in twenty-five years. The owners made a good-faith deposit of $14,000 in accordance with this agreement.

At the condemnation proceeding, where the only issue was just compensation as of January 18, 1963, controversy developed over the question, among others, as to the relevance of the lease and sale-leaseback agreements to market value at the date of taking.

The testimony of the real estate experts on value was, as is usual, in conflict. Government experts' appraisals ranged from $1,140,000 to $1,372,000. Both Government experts acknowledged that, although they knew about the Government lease and the commitment of the Insurance Society, they gave these contracts little or no weight in their appraisals because each was contingent. Experts for the property owners gave opinions on value ranging from $2,577,000 to $2,962,000. The Government lease and the projected sale and leaseback agreement with the Insurance Society figured importantly in their testimony, and they and one of the Government experts testified extensively about the estimated cost of remodelling the buildings to meet the terms of the lease to the Government.

Appellants allege numerous errors: (a) It was error to rule in the pretrial order that "appraisal reports will not

be exchanged and no additional [beyond mere names] discovery pertaining to these expert witnesses will be allowed." They challenge this order in the light of their post-trial claimed "discovery" that two real estate experts had rendered to the Government appraisals which substantially agreed with the Appellants' valuations and that the Government had "withheld" this information from the Appellants. Upon learning of this after trial, Appellants moved in the District Court for a new trial on the ground of newly discovered evidence; they allege as error the denial of this motion without hearing. (b) It was error to rule that the two agreements by the condemnees, one with the Government for the lease of the condemned property (subject to improvements) and the other with the Insurance Society for the sale and lease-back of the property, were admissible to show "highest and best use" of the property but not "as indicia of fair market value." (c) Also claimed as erroneous was the trial judge's ruling, which he changed on the last day of trial, excluding evidence of the amount actually expended by Appellants before the taking for renovation of the property pursuant to the lease agreement.

Appellants also contend error was committed in restricting the cross examination of one of Appellants' experts and in failing to strike that expert's testimony. Each of these two contentions is without merit. The Court ruled out cross examination which was repetitive and argumentative; the testimony was that of a duly qualified expert. Whether it was based on sound appraisal practice was of course subject to attack and the weight of the testimony was a matter for the jury to resolve.

Appellants' other contentions will be treated in the above order. (a) *Denial of pretrial examination of Government's appraisal reports*: The essence of Appellants' contentions on this score is that the Government had appraisals made by William F. Harps and Arthur M. Fisher and that subsequent to trial Appellants learned that Harps and Fisher each gave reports to the Government with appraisals of more than $2,000,000, the precise figures being unavailable to Appellants. But we note that before trial the parties were directed by the District Court to give each other the names of all experts each expected to call as witnesses. Appellants concede that they knew before trial that both Harps and Fisher had been employed by the Government. Therefore, it can hardly be contended that their testimony is "newly discovered evidence." When the Government's case closed without Harps and Fisher being called, Appellants had ample opportunity to take whatever steps they deemed in their interest to explore their views and to call them as witnesses if they chose. Furthermore, even if the original denial of discovery had been error, a question we do not reach, the Appellants have not been prejudiced. Any testimony that Harps and Fisher might have given would have been cumulative only. That the Government consulted them but did not use their opinions is not relevant evidence of value; Appellants could not show the prior consultation in order to bolster the witnesses' credibility, nor could they seek to arouse jury prejudices by showing the prior consultation under the guise of proving the experts' qualifications. If Appellants wanted more expert testimony on value it was for them to produce such evidence.

(b) *Limitation on evidentiary weight of lease to Government and projected sale and leaseback with Insur-*

ance Society: It is clear that the Government experts did not give weight to the GSA lease and the Insurance Society's commitment, but this was well known to the jury, who were also aware that Appellants' experts gave substantial weight to these factors. The District Judge's comments of these factors during trial were admittedly ambiguous and standing alone might constitute error. Nevertheless, in a comprehensive charge to the jury he made it plain that these two factors—the GSA lease and the Insurance Society's commitment—were evidence of the highest and best use of the property and that this in turn was relevant evidence bearing on the ultimate issue of value as of January 18, 1963.[1]

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[1] Now, the jury is instructed that if any property is peculiarly adapted by its construction, improvements or intrinsic character to some particular use or uses which gives it a higher market value than it would otherwise have, the circumstance or circumstances which make up such peculiar adaptability for such particular use or uses shall be considered, and the amount awarded as compensation for the property should be based upon its fair market value on January 18, 1963 in view of the most valuable use or uses for which it is shown the property is adaptable.

Now, by the most valuable use or uses to which the property can or may be put is meant either some existing use or one which the evidence shows is so reasonably likely in the near future that the availability of the property for that use would affect its present market value and would be taken into account by a purchaser under fair market conditions.

* * * *

In determining the value of the land, meaning buildings thereon, also you are not to consider or be influenced by the fact that these proceedings, that is, proceedings here in Court, are pending for the taking of the property. *You must consider all elements for the highest and best use of the property, including the lease to the United States, the lease which has been referred to in the evidence between General Services Administration and the property owners in question, as well as to the sale and the leaseback,* the sale being to the Woodmen of the World and the leaseback to the property owners, *and all other elements as might influence a reasonably prudent person interested in purchasing the property.*
R. 1166, 1168. (Emphasis added.)

The Appellants were not entitled to an instruction that the sale and sale-leaseback agreements were *direct* evidence of market value rather than merely evidence of highest and best use, that being a factor for the jury to take into account in deciding the ultimate issue of value. See *United States* v. *25.406 Acres of Land,* 172 F.2d 990, 993 (4th Cir. 1949) (Parker, C. J.). When evidence is offered of a prospective use, as in this case, new elements of speculation enter the determination. Each of those elements reflects upon the feasibility of the prospective use as a highest and best use and, in turn, upon market value. See *Levin v. State,* 13 N.Y.2d 87, 192 N.E.2d 155, 242 N.Y.S.2d 193 (1963) (Fuld, J.). Here those elements include the prospects for completion, the cost thereof, and the likelihood of a long-term market for office space in the area of the condemned property. We cannot say that the evidence in this case showed a prospective use so likely of successful consummation that it should be treated as already in effect and therefore direct evidence of fair market value, assuming, *arguendo,* prospective use can ever attain that status.

It is clear that the Court plainly linked "all elements of the highest and best use" arising out of the GSA lease and the Insurance Society sale and leaseback to value as of time of taking. The jury was told that these factors "and all other elements as might influence" a prudent purchaser, were to be taken into account in making the award. This corected any prior confusion or ambiguity. We also note that in summation to the jury, Appellants' counsel vigorously and clearly presented the view, consistent with the Court's charge, that "highest and best use" as reflected by the GSA lease and the Insurance Society commitments, was evidence of

market value. From the arguments and charge, therefore, the jury could not have been in doubt on this score.

(c) *Exclusion of evidence of remodelling expense incurred by Appellants before taking*: Appellants correctly assert that the District Judge's pretrial order excluded evidence of expense incurred by Appellants before the taking, to improve and remodel the buildings in compliance with the lease terms. Assuming that this was error, the record shows that later during trial and before the close of Appellants' case, the District Court changed this ruling and advised Appellants that "the Court is perfectly willing to let them [Appellants] show any expenditure."[2] Appellants now contend that coming so late

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[2] (Mr. Liotta) [Counsel for Appellee] May my objection be noted to any cost coming in in this case? I respectfully submit that we are already into the frustration of their business plans and it will just accentuate it.

(The Court) The Court is perfectly willing to let them show any expenditure.

(Mr. Bernstein [Counsel for Appellants] That is not the issue.

(The Court) I said you wanted the plans and costs in.

(Mr. Liotta) He said they paid a quarter of a million.

(Mr. Bernstein) You are changing the ruling now?

(The Court) Yes.

(Mr. Bernstein) Now, I am perfectly frank—we have the problem of whether we want, whether we might want to infect the record with error.

(The Court) You are the one that is—

(Mr. Bernstein) We do not think it is necessary.

(Mr. Liotta) You are referring to actual moneys paid, sir.

(The Court) That is right.

(Mr. Bernstein) Let me get a list and show Your Honor. I do not think we want to prove any of those. But I want to show Your Honor a list of that.

R. 919-21.

in the trial they could not accommodate themselves and prepare the evidence for submission. However, the statements of Appellants' counsel at the time of the change in the ruling show a belief on his part that such evidence would not be necessary. Even aside from those statements, Appellants' failure to request additional time or a recess discredits their claim on appeal that the reason they did not introduce evidence of renovation expense was unpreparedness resulting from reliance on the pretrial ruling. Therefore, this contention lacks merit.

Our examination of the record satisfies us that such ambiguities or error in rulings as occurred during trial were corrected and the issues were fairly and fully presented to the jury, and that the jury verdict represents a permissible choice among the alternatives available.

Affirmed.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1965

No. 18,918

ALPERT P. DICKER, ET. AL.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 19,036

CERTAIN LAND IN SQUARE 378
IN THE DISTRICT OF COLUMBIA, ET. AL.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Danaher and Burger, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the judgment of the District Court and the order denying motion for new trial on the ground of newly discovered evidence are affirmed.

Per Circuit Judge Burger.

Dated: October 22, 1965.